No. 92-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

OWENS-CORNING FIBERGLAS CORPORATION,

Petitioner,

—v.—

OPAL JOHNSON, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR FOR THE ESTATE OF WILLIAM JOHNSON, DECEASED,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FOURTH DISTRICT

PETITION FOR A WRIT OF CERTIORARI

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March 2, 1993

QUESTION PRESENTED

Where a state court cannot constitutionally exercise personal jurisdiction over or require the appearance of certain out-of-state employees of a corporate defendant, does the Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibit the court from circumventing constitutional limits on its jurisdiction by conscripting the private employer—on pain of substantial sanctions—to compel those specific employees to travel to the state and appear as witnesses in a civil trial?

LIST OF PARTIES AND RULE 29.1 STATEMENT

The petitioner and respondent before this Court were the only parties in the Appellate Court of Illinois.

Pursuant to Rule 29.1 of the Rules of this Court, petitioner Owens-Corning Fiberglas Corporation states that it is a publicly held corporation, has no parent company and has no affiliates other than wholly owned subsidiaries.

The plaintiff in the trial court (respondent here) was Opal Johnson, individually and as special administrator for the estate of William Johnson, deceased. The defendants named in the complaint were Owens-Corning Fiberglas Corporation; Brakegate, Ltd.; Charter Consolidated, PLC; Charter Consolidated Services, Ltd.; Central Mining Finance, Ltd.; The Consolidated Mines Selection Company, Ltd.; British South Africa Company; Cape Asbestos Fibres, Ltd.; EGNEP (Pty) Limited; Gatke Corporation; Abex Corporation; H.K. Porter Company, Inc.; and North American Asbestos Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Owens-Corning Fiberglas Corporation ("OCF") respectfully prays that this Court grant a writ of certiorari to review the judgment of the Appellate Court of Illinois, Fourth District, entered in this case on August 27, 1992.

OPINION BELOW

The Appellate Court's opinion is reported at 233 Ill. App. 3d 425, 599 N.E.2d 129, 174 Ill. Dec. 583 (1992), and is reprinted in the appendix at 1a-16a. The order of

the Supreme Court of Illinois denying OCF leave to appeal is noted at 147 Ill. 2d 627 and is reprinted in the appendix at 17a.

The relevant orders and judgment of the trial court, the Circuit Court of McLean County, Illinois, have not been reported. They are reprinted in the appendix at 20a-24a and 27a-36a.

JURISDICTION

The judgment of the Appellate Court of Illinois was entered on August 27, 1992. On December 2, 1992, the Supreme Court of Illinois denied OCF's timely request for leave to appeal. This petition has been filed within 90 days of that ruling. This Court has jurisdiction to review the Appellate Court's judgment under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

This petition involves Section 1 of the Fourteenth Amendment to the United States Constitution, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The petition also involves Illinois Supreme Court Rule 237(b), Ill. Ann. Stat. ch. 110A, para. 237(b) (Smith-Hurd 1985), which provides:

> The appearance at the trial of a party or a person who at the time of trial is an officer, director, or employee of a party may be required by serving the party with a notice designating the person who is required to appear. The notice also may require the production at the trial of documents or tangible things. If the party or person is a nonresident of the county, the court may order any terms and conditions in connection with his appearance at the trial that are just, including payment of his reasonable expenses. Upon a failure to comply with the notice, the court may enter any order that is just, including any order provided for in Rule 219(c) that may be appropriate.

This petition questions the constitutionality of Illinois Supreme Court Rule 237(b) as applied in this case. Because neither the State of Illinois nor any agency, officer or employee of that State is a party, OCF notes that 28 U.S.C. § 2403(b) might be applicable.

STATEMENT OF THE CASE

William Johnson, respondent's ("plaintiff's") decedent, worked from 1951 until 1977 at the Bloomington, Illinois plant of Unarco Industries, Inc., which OCF purchased in April 1970. He died in 1987. In 1989, plaintiff sued OCF in the Circuit Court of McLean County, alleging that OCF had committed a battery against her husband by intentionally causing his death through exposure to asbestos-containing products at the Bloomington plant.

On October 15, 1991, shortly before trial, plaintiff filed a notice under Illinois Supreme Court Rule 237(b), demanding that OCF produce Dr. Jon Konzen and Mr. William W. Boeschenstein as witnesses at trial. Dr. Konzen was then OCF's Vice President for Medical and Health Affairs; Mr. Boeschenstein was and is a member of OCF's board of directors and previously had been OCF's President and Chief Executive Officer. Each of them had his residence and principal place of business in Ohio.[1]

OCF moved to quash the notice on the ground that Rule 237(b) "is unconstitutional . . . in that it is violative of the Constitution of the State of Illinois . . . [and] the United States Constitution, the Fifth Amendment and the Fourteenth Amendment." [5 R. C1917.] It was undisputed that the individuals lacked minimum contacts with Illinois and that the court itself thus could not require them to appear in that State. OCF therefore argued that the Due Process Clause prevented the court from using OCF as a tool to achieve indirectly what the court could not do directly: compel the Ohio residents to surrender their right not to appear in an Illinois court.

Dr. Konzen and Mr. Boeschenstein also filed special and limited appearances and moved for a protective order. Both men submitted affidavits asserting their lack of contacts with Illinois and their unwillingness to travel to that State to testify, but both reaffirmed their previous offers to submit to depositions in Ohio.

On November 1, 1991, the trial court denied OCF's motion to quash [31a] and struck the individuals' special

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[1] In April 1991, plaintiff had asked to depose Dr. Konzen and Mr. Boeschenstein. Both men made themselves available for depositions in Toledo, Ohio, on several different dates, but plaintiff chose not to depose either of them.

and limited appearances and motion for a protective order [29a]. The court acknowledged that it lacked "the authority to compel [the witnesses] to come to the State of Illinois to testify" [27a]—but it nevertheless concluded that due-process principles did not apply because "the coercion, if there is any, . . . is the economic coercion of their employer in desiring to have their testimony in court" [28a]. The court added that "[i]f Owens-Corning does not wish to produce these people, then, of course, it is subject to default." [28a.]

The court denied OCF's motions for leave to file an interlocutory appeal [23a] and for a stay pending disposition of OCF's mandamus petition to the Illinois Supreme Court [24a]. The Illinois Supreme Court later denied OCF's emergency motion for a stay [25a] and OCF's petition for leave to file a complaint for mandamus or a supervisory order [26a].

On November 7, 1991, OCF's counsel told the court that Dr. Konzen and Mr. Boeschenstein would not appear at trial. Plaintiff then moved for sanctions and asked the court to strike OCF's answer, enter a default against OCF on both liability and causation, and proceed to trial only on the issue of damages.

The court again overruled OCF's constitutional objections and granted plaintiff's motion for sanctions. The court struck OCF's answer and ordered a default on all issues except the amount of damages. [36a.]

The case was tried solely on the issue of damages, and the jury returned a $510,000 verdict for plaintiff. The court entered judgment on the verdict. [20a.]

OCF filed timely post-trial motions arguing that Rule 237(b) "can[not] supersede federal due process principles,

which . . . prevent this court from compelling the appearance of these individuals at trial." [5 R. C2210-11.] The court denied the motions on February 4, 1992. [21a-22a.]

OCF appealed to the Appellate Court for the Fourth District and again urged that Rule 237(b), as applied here, was "contrary to fundamental principles of Illinois and federal due process."[2] The court affirmed the judgment on August 27, 1992. [1a-16a.]

The Appellate Court noted that "[t]he trial court recognized it did not have personal jurisdiction over [Dr. Konzen and Mr. Boeschenstein]." [11a.] But it nevertheless held that the trial court's orders did not violate due-process principles because "[u]ltimately, it is the corporate defendant which forces its employees to submit to the jurisdiction of Illinois, not the court." [11a.]

OCF then petitioned for leave to appeal to the Illinois Supreme Court, again raising its federal due-process claims.[3] The Illinois Supreme Court denied OCF's petition on December 2, 1992. [17a.]

REASONS FOR GRANTING THE WRIT

The Illinois Appellate Court improperly approved an approach that permits state courts to circumvent Fourteenth Amendment limitations on their jurisdiction by conscripting employers to coerce the appearance of named individual employees over whom the State itself

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[2] OCF Brief at 15; *see also id.* at 21; OCF Reply Brief at 1-2, 11 (arguing that Rule 237(b) as applied by trial court violated federal due process).

[3] *See* Petition for Leave to Appeal at 11-12, 16 n.5, 22 (arguing that Rule 237(b) as applied by trial court violated federal due process).

cannot constitutionally exercise personal jurisdiction. More generally, the Appellate Court's analysis permits any State to evade constitutional constraints by forcing private parties—on pain of sanctions—to do things that the State itself cannot do directly.

This erroneous and dangerous doctrine subverts constitutional limitations on States' authority and undermines the distinction between public and private action, in conflict with numerous decisions of this Court. The Appellate Court's ruling also presents an important question of federal law that this Court should settle promptly—to prevent other parties from using Illinois Supreme Court Rule 237(b) and any similar rules in other States to harass corporate litigants by threatening to turn their directors, officers and employees into full-time witnesses.

I.

An Employer's Actions Against Its Employees, When Compelled by State Law or Authority, Constitute State Action Subject to the Fourteenth Amendment, and the Illinois Court Therefore Could Not Properly Try to Coerce OCF to Achieve a Result That the Court Could Not Constitutionally Accomplish on Its Own.

It is undisputed in this case that the trial court itself lacked jurisdiction to compel Dr. Konzen and Mr. Boeschenstein to appear as witnesses at trial.[4] The trial

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[4] A court cannot require individuals to give evidence unless it can exercise personal jurisdiction over them. *E.g.*, *Robertson v. Railroad Labor Board*, 268 U.S. 619, 622-27 (1925); *In re Marc Rich & Co.*, 707 F.2d 663, 667 (2d Cir.), *cert. denied*, 463 U.S. 1215 (1983); *see In re Sealed Case*, 832 F.2d 1268, 1272-73 (D.C. Cir.

court and the Appellate Court therefore concluded that an Illinois court could not constitutionally subpoena those individuals directly. [11a, 27a-28a.]

But despite this lack of constitutional authority to compel Dr. Konzen's and Mr. Boeschenstein's appearance, the Appellate Court saw no due-process problem in the trial court's sanctioning OCF for failing to force the out-of-state individuals to appear because "[u]ltimately, it is the corporate defendant which forces its employees to submit to the jurisdiction of Illinois, not the court." [11a.] This reasoning ignores the principle that a private employer's (or any other private person's) actions are the State's actions for due-process purposes when they are coerced or required by state authority—and that the Fourteenth

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1987); *Solliday v. District Court*, 135 Colo. 489, 498, 313 P.2d 1000, 1004-05 (1957); *Pasto v. State*, 356 So. 2d 587, 590 (Miss. 1978); *State v. Waits*, 92 N.M. 275, 277, 587 P.2d 53, 55 (Ct. App. 1978); *State ex rel. McKee v. Breidenbach*, 246 Wis. 513, 517-18, 17 N.W.2d 554, 556 (1945).

The Due Process Clause itself precludes a sovereign from exercising personal jurisdiction over a person or entity who does not have at least "minimum contacts" with the forum. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *In re Sealed Case*, 832 F.2d at 1273; *see also Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987) (state-court jurisdiction must not "offend ' "traditional notions of fair play and substantial justice" ' ") (quoting *International Shoe Co.*, 326 U.S. at 316).

That Dr. Konzen was an employee and Mr. Boeschenstein a director and former officer of a corporation over which the Illinois court did have personal jurisdiction is immaterial. Employees' contacts with the forum "are *not* to be judged according to their employer's activities there." *Calder v. Jones*, 465 U.S. 783, 790 (1984) (emphasis added); *accord Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13 (1984) ("jurisdiction over an employee does not automatically follow from jurisdiction over the corporation which employs him").

Amendment therefore prohibited the trial court from trying to force OCF to do what the court itself could not constitutionally accomplish.

A. The Fourteenth Amendment Applies to Private Conduct Coerced by the State.

This Court's precedents establish that a State may not avoid constitutional limitations on its own powers merely by having a private party act on its behalf or in its stead. Where the Fourteenth Amendment precludes the State itself from doing something, the State " 'may not [so act] by direct action or through the medium of others who are under State compulsion to do so.' " *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 171 (1970) (emphasis omitted) (quoting *Baldwin v. Morgan*, 287 F.2d 750, 755-56 (5th Cir. 1961)); *accord Peterson v. City of Greenville*, 373 U.S. 244, 247-48 (1963).

In *Truax v. Raich*, 239 U.S. 33 (1915), for example, the Court upheld an injunction against the prosecution of an employer for exceeding a state-imposed limit on the number of noncitizens that private employers could hire. The Court recognized that the State itself could not "deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood." *Id.* at 41. Nor could the State achieve that result by coercing private employers to do so.

Even though the employer in *Truax* had the absolute right under state law to discharge his noncitizen employees at will, any such discharge in this situation would have resulted from state-imposed requirements, not from the employer's own volition. *Id.* at 38. The noncitizen employees had a "manifest interest in the freedom of the employer to exercise his judgment without illegal inter-

ference or compulsion." *Id.* The statute's coercion of that judgment therefore violated the constitutional rights of the noncitizen employees, who could lose their jobs because of state-imposed sanctions against their private employer. *Id.* at 38-39.

The Court employed a similar analysis in *Barrows v. Jackson*, 346 U.S. 249 (1953), in which a party to a racially restrictive covenant brought a damages action against another party who had breached that covenant. Just as the private employer in *Truax* could have fired his noncitizen employees at will, the private covenantor in *Barrows* lawfully could have discriminated against non-Caucasians. The covenant itself was not invalid under the Fourteenth Amendment, and "no one's constitutional rights were violated by the covenantor's voluntary adherence thereto. Such voluntary adherence would constitute individual action only." 346 U.S. at 253.

But just as the State in *Truax* could not itself deny employment to noncitizens or force the private employer to do so on pain of prosecution, so too could it not discriminate against non-Caucasians in *Barrows* or pressure the private covenantor to do so by holding her liable for damages:

> If the State may thus punish respondent for her failure to carry out her covenant, she is coerced to continue to use her property in a discriminatory manner, which in essence is the purpose of the covenant. Thus, it becomes not respondent's voluntary choice but the State's choice that she observe her covenant or suffer damages.

346 U.S. at 254.

These cases and others make clear that " 'private conduct abridging individual rights does no violence to the [Fourteenth Amendment] *unless* to some significant extent the State in any of its manifestations has been found to have become involved in it.' " *Peterson v. City of Greenville*, 373 U.S. at 247 (emphasis added; citation omitted) (Fourteenth Amendment violated where blacks were denied service and arrested in private restaurant because of local ordinance requiring racial separation; even though "manager would have acted as he did independently of the existence of the ordinance," convictions "had the effect . . . of enforcing the ordinance," *id.* at 248); *see Robinson v. Florida*, 378 U.S. 153, 156 (1964) (reversing trespass convictions for refusal to leave private restaurant because State had regulation and manual "putting burdens upon any restaurant which serves both races, burdens bound to discourage the serving of the two races together"); *see also North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975) (private bank's freezing of assets violates Due Process Clause because state court had issued prejudgment writ of garnishment directing bank to act); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969) (private employer's garnishment of employee's wages violates Due Process Clause because clerk of state court had issued prejudgment garnishment order to employer).

B. The State Court Could Not Constitutionally Punish OCF for Not Doing What the Court Itself Could Not Do.

Because the Fourteenth Amendment applies when a State compels, coerces or otherwise "to some significant extent . . . become[s] involved in" a private actor's conduct, *Peterson*, 373 U.S. at 247, the trial court's attempt

to force OCF to require Dr. Konzen and Mr. Boeschenstein to appear at trial constituted state action for due-process purposes.

It is no answer to say that OCF could have ordered its employees or directors to travel to Illinois to testify. [28a, 30a.] Nor is it an answer to say that OCF made the "choice" to suffer a default rather than to command the two individuals to appear. [28a, 33a-34a.]

Where the State subjects OCF to a default judgment with substantial liability for failing to make the "choice" that plaintiff and the trial court wanted it to make (but could not have compelled through subpoena power), that "choice" is just as coerced and illusory as was the private employer's "choice" in *Truax* or the private covenantor's "choice" in *Barrows*. The decision "becomes not [OCF's] voluntary choice but the State's choice" that OCF compel the witnesses' attendance "or suffer damages." *Barrows*, 346 U.S. at 254. State action therefore is present, and the Fourteenth Amendment constrains the court's conduct.[5]

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[5] The State's involvement here easily meets this Court's two-part test for determining whether a private actor's conduct constitutes state action. *See Georgia v. McCollum*, 112 S. Ct. 2348, 2354-55 (1992); *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2082-83 (1991); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

First, both the demand that the individuals testify and the sanctions imposed on OCF arose from Illinois Supreme Court Rule 237(b), as invoked by plaintiff and enforced by the Illinois courts, and therefore "resulted from the exercise of a right or privilege having its source in state authority." *McCollum*, 112 S. Ct. at 2354; *Edmonson*, 111 S. Ct. at 2082-83; *Lugar*, 457 U.S. at 939. Moreover, a court rule requiring the appearance of witnesses at trial—like the peremptory challenges at issue in *McCollum* and *Edmonson*—"ha[s] no significance outside a court of law." *Edmonson*, 111 S. Ct. at 2083.

(*footnote continued*)

The Appellate Court therefore contravened settled constitutional principles in holding that Rule 237(b) raised no due-process problems because "[u]ltimately" it is the private employer, not the State, that "forces its employees to submit to the jurisdiction of Illinois" [11a]. A State cannot do through a private person what the Fourteenth Amendment prohibits it from doing directly. *Adickes*, 398 U.S. at 171; *cf. Planned Parenthood v. Danforth*, 428 U.S. 52, 69 (1976) ("the State cannot 'delegate to a spouse a veto power which the state itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy' "); *Terry v. Adams*, 345 U.S. 461, 469 (1953) (opinion of Black, J.) (State cannot "circumvent[ ]" Fifteenth Amendment by permitting political association to hold discriminatory primary election).[6]

Second, a private party required to do something under state compulsion "can be described as a state actor," *McCollum*, 112 S. Ct. at 2355; *see Edmonson*, 111 S. Ct. at 2083; *Lugar*, 457 U.S. at 937, 939. *See, e.g., Adickes*, 398 U.S. at 170; *Barrows*, 346 U.S. at 253-54; *Truax*, 239 U.S. at 38-39. "When the State has commanded a particular result, it has saved to itself the power to determine that result and thereby 'to a significant extent' has 'become involved' in it, and, in fact, has removed that decision from the sphere of private choice." *Peterson*, 373 U.S. at 248.

[6] OCF, as the party against which the trial court imposed the sanctions, has standing to raise Dr. Konzen's and Mr. Boeschenstein's due-process rights in defending itself against the State's action. *See, e.g., Planned Parenthood v. Danforth*, 428 U.S. at 62 (physicians potentially subject to criminal prosecution under statute restricting abortion have standing to raise their patients' constitutional rights); *Barrows*, 346 U.S. at 255-60 (covenantor can assert equal-protection rights of non-Caucasians where covenantor herself has been sued for damages).

II.

This Court's Review Is Necessary to Resolve This Important Constitutional Issue and to Prevent Rampant Litigation Abuse Threatening Recurrent Deprivations of Constitutional Rights.

The Illinois Appellate Court's constitutionally infirm ruling that an employer's judicially mandated coercion of its employees is not state action for due-process purposes has potentially far-reaching implications. For example, its reasoning would permit a State to sanction a private employer for refusing to require specified out-of-state employees, under threat of termination, to submit to state-court jurisdiction not only as witnesses but also as defendants—thereby circumventing the Fourteenth Amendment's prohibition against state-court exercise of jurisdiction over individual employees who themselves lack minimum contacts with the State, *see Calder v. Jones*, 465 U.S. at 790; *Keeton v. Hustler Magazine, Inc.*, 465 U.S. at 781 n.13. A State also could coerce an employer to order individual employees (in their personal capacity) to waive their Fifth Amendment rights against self-incrimination, or to do any number of other things that the State itself could not require.

Moreover, the constitutionality of state-court rules requiring employers to produce their employees and directors as witnesses is an important question that frequently recurs at the trial-court level. In fact, it already has arisen in several other cases against OCF in Illinois and elsewhere, and OCF has suffered a number of other defaults for refusing to force specified officers, directors or employees to appear in forums that could not constitutionally exercise personal jurisdiction over them.

In one such case alone, where the plaintiffs demanded the appearances of OCF's Chairman and Chief Executive Officer and its Chief Financial Officer (among others), the court entered a default judgment affecting OCF's liability for compensatory and punitive damages. That default cost OCF more than $10.5 million (including $7.5 million in punitive damages). *Pickering v. Owens-Corning Fiberglas Corp.*, Nos. 90-L-1546, 91-L-621 to -623 (Ill. Cir. Ct., 3d Jud. Cir., Madison County, April 13, 1992) (appeal pending).[7]

A state provision like Rule 237(b) can be a powerful weapon of harassment against corporate litigants such as OCF, which at the time of trial was defending against some 3,400 claims in Illinois alone—and more than 80,000 asbestos personal-injury claims nationwide. If any and every plaintiff, simply by filing a notice under a state rule, could require a corporate party anywhere in the world to drag its top officers, directors and employees into any state court in the nation, no company would be able to function. Its officers, directors and employees virtually would become full-time witnesses, spending their time in airplanes, lawyers' offices and courtrooms, rather than at their jobs.[8]

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[7] Illinois trial courts have entered defaults against OCF under Rule 237(b) in at least six other cases: *Hammond v. OCF*, No. 87-L-246 (Ill. Cir. Ct., 11th Jud. Cir., McLean County); *Smith v. OCF*, No. 87-L-293 (Ill. Cir. Ct., 11th Jud. Cir., McLean County); *Adcock v. OCF*, No. 87-L-306 (Ill. Cir. Ct. 11th Jud. Cir., McLean County); *Gerzsenye v. OCF*, No. 89-L-269 (Ill. Cir. Ct., 11th Jud. Cir., McLean County); *Costa v. OCF*, No. 88-L-239 (Ill. Cir. Ct., 10th Jud. Cir., Peoria County); *Kearney v. OCF*, No. 89-L-1153 (Ill. Cir. Ct., 6th Jud. Cir., Champaign County).

[8] That the real agenda behind plaintiff's Rule 237(b) notice was to harass or pressure OCF, rather than to obtain needed testimony, is evident from the fact that plaintiff chose not to depose Dr.

OCF believes that the constitutional issue in this case regularly arises in actions against other defendants as well but tends to evade review. Both the magnitude of the possible sanctions for refusing to compel out-of-state employees to appear and the unavailability of an appeal as of right until after entry of final judgment can strongly discourage a party defending a single action from taking the position that OCF took below. *See Bluestein v. Upjohn Co.*, 102 Ill. App. 3d 672, 678-79, 430 N.E.2d 580, 585 (1981) (after Illinois Supreme Court denied mandamus petition, defendant produced witness). A "repeat" litigant such as OCF, however, which has been sued by tens of thousands of asbestos plaintiffs, cannot afford to acquiesce every time a plaintiff demands that it bring specified officers, employees and directors to a foreign State.

The federal District Courts have capably administered justice for decades without being able to compel the attendance of parties' employees and directors—or even of parties themselves—residing beyond their subpoena power as limited by Fed. R. Civ. P. 45(b)(2). Federal courts regularly have rejected the argument that they possess inherent authority to compel a party—or an officer, director or employee of a corporate party—to appear at trial when he or she is outside the court's subpoena power. *E.g.*, *McGill v. Duckworth*, 944 F.2d 344, 354 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1265 (1992); *GFI Computer Indus., Inc. v. Fry*, 476 F.2d 1, 5 (5th Cir. 1973); *Central Grain & Stock Exch. v. Board of Trade*, 125 F. 463, 467-68 (7th

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Konzen or Mr. Boeschenstein, despite their repeated willingness to make themselves available in Ohio. (The *Pickering* plaintiffs also declined to depose any of the four persons whose trial appearances they demanded.) If plaintiff genuinely believed that these individuals had important information, she and her lawyers surely would have wished to explore it with them *before* they took the witness stand in front of the jury.

Cir. 1903); *In re Air Crash Disaster at Detroit Metro. Airport*, 130 F.R.D. 647, 650 (E.D. Mich. 1989); *Standard Metals Corp. v. Tomlin*, [1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,644, at 93,176 (S.D.N.Y. 1982); *Steel, Inc. v. Atchison, T. & S.F. Ry. Co.*, 41 F.R.D. 337, 339 (D. Kan. 1967); *see also Czuprynski v. Shenango Furnace Co.*, 2 F.R.D. 412, 412-13 (W.D.N.Y. 1942).

The federal courts' experience demonstrates that constitutional limitations on state courts' authority to compel the attendance of out-of-state witnesses work no unfairness, for "[t]he law furnishes ample machinery to procure the testimony of any witness, . . . if the witness is beyond the jurisdiction of the court, by deposition or upon commission." *Central Grain & Stock Exch. v. Board of Trade*, 125 F. at 467-68. In this case, plaintiff could have deposed Dr. Konzen and Mr. Boeschenstein in Ohio and then introduced at trial all admissible portions of those depositions. Ill. Sup. Ct. R. 202, 206, 212, Ill. Ann. Stat. ch. 110A, paras. 202, 206, 212 (Smith-Hurd 1985 & Supp. 1992). Alternatively, she could have sued in a forum that would have had subpoena power over them.

Extraterritorial application of Illinois Rule 237(b) therefore is not essential for the effective administration of justice. This Court should not countenance its continued, unconstitutional use as a harassment device.

CONCLUSION

The petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

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March 2, 1993

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IN THE APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

No. 4-92-0175

(August 27, 1992)

OPAL JOHNSON, Individually and as Special Administrator for the Estate of WILLIAM JOHNSON, deceased,

Plaintiff-Appellee,

—v.—

OWENS-CORNING FIBERGLAS CORPORATION,

Defendant-Appellant,

—and—

BRAKEGATE, LTD., CHARTER CONSOLIDATED, PLC, CHARTER CONSOLIDATED INVESTMENTS, LTD., CHARTER CONSOLIDATED SERVICES, LTD., CENTRAL MINING FINANCE, LTD., THE CONSOLIDATED MINES SELECTION COMPANY, LTD., BRITISH SOUTH AFRICA COMPANY, CAPE ASBESTOS FIBRES, LTD., EGNEP (PTY) LIMITED, GATKE CORPORATION, ABEX CORPORATION, H.K. PORTER COMPANY, INC., and NORTH AMERICAN ASBESTOS CORPORATION,

Defendants.

Appeal from Circuit Court of McLean County
No. 89-L-187
Honorable William T. Caisley, Judge Presiding.

JUSTICE COOK delivered the opinion of the court:

Owens-Corning Fiberglas Corporation (OCF or defendant) appeals the default judgment entered against it for noncompliance with a Supreme Court Rule 237(b) (134 Ill. 2d R. 237(b)) notice, compelling it to produce its medical director and a member of its board of directors as witnesses at trial; the judgment entered against it; and the order denying its motion for post-trial relief. Defendant argues (1) the trial court lacked authority under Rule 237(b) to sanction it for failing to produce witnesses who are not individually subject to Illinois process; (2) the sanctions entered against it exceeded the permissible scope of Supreme Court Rule 219(c) (134 Ill. 2d R. 219(c)); and (3) the trial court erred in giving a negative inference instruction. We affirm.

On September 19, 1989, plaintiff, in her individual capacity and as special administrator of the estate of William Johnson, deceased, filed a 12-count complaint in the circuit court of McLean County against defendant OCF, and other defendants not parties to this appeal, seeking damages for injuries sustained due to the death of decedent. All defendants, except OCF, were dismissed as parties or default judgments were entered against them before trial. Counts V through XII of the complaint were directed at OCF. These counts alleged various theories of recovery including civil conspiracy (counts V and VI), murder (counts VII and X), intentional or fraudulent misrepresentation (counts VIII and XI), and battery (counts IX and XII). All counts, except count IX, were dismissed before trial.

Decedent was employed from 1951 to 1977 at the Bloomington, Illinois, plant of Unarco Industries, Inc., which OCF purchased in April 1970. Decedent died on November 27, 1987. The death certificate indicated the

cause of death was "chronic respiratory insufficiency," "restrictive lung disease," and "pulmonary asbestosis." Decedent also suffered from "chronic renal failure," a condition cited as contributing to his death but not related to the cause of death. An autopsy performed on decedent after the death certificate was signed disclosed decedent also had lung cancer.

The remaining count against defendant alleged that it committed a battery against decedent by intentionally causing his death by exposing him to asbestos. Plaintiff claimed decedent was exposed to asbestos while he worked at the plant and, as a result of his exposure, contracted asbestosis and lung cancer. She further averred that defendant knew exposure to asbestos caused asbestosis and malignancies, and it knew decedent would be exposed to asbestos and would die as a result. She also stated defendant's purpose was to operate the plant using asbestos and asbestos products, and in doing so, defendant intended to cause great bodily harm to decedent. She contended defendant's intentional conduct was the proximate cause of decedent's death.

On October 15, 1991, plaintiff filed a request, pursuant to Rule 237(b) (134 Ill. 2d R. 237(b)), that defendant produce Dr. Jon Konzen, medical director of defendant; W.W. Boeschenstein, former chairman and chief executive officer of defendant and a current member of its board of directors; and various documents at trial. In response, Konzen and Boeschenstein filed a special and limited appearance and a motion for a protective order, contesting the court's authority to assert personal jurisdiction over them and compel them to travel to Illinois to testify. Defendant concurrently filed a motion to quash plaintiff's Rule 237(b) request insofar as it related to the production of Konzen and Boeschenstein at trial. It argued that plaintiff could not demonstrate good cause sufficient to justify

the compelled appearance of these individuals, and the court lacked authority under the Illinois long-arm statute to compel them to appear. Defendant further argued that Rule 237(b) was unconstitutional on its face and as applied to Konzen and Boeschenstein because it violated due process in that it sought to compel the attendance of nonparty witnesses not subject to the jurisdiction of Illinois.

In response, plaintiff filed a motion to strike the special and limited appearance and motion for a protective order. The court subsequently struck the special and limited appearance and ordered defendant to produce the witnesses. The court agreed that it did not have the authority to compel them to come to Illinois to testify but that any "coercion" upon them to appear was the "economic coercion of [defendant]" and the desire to have their testimony heard in court. It further agreed due process applied to Rule 237(b), but determined no violation of due process occurred because the request was directed at defendant, over which the court had jurisdiction. The court also denied defendant's motion to quash.

In light of these rulings, defendant sought leave to file an interlocutory appeal pursuant to Supreme Court Rule 308 (134 Ill. 2d R. 308), which the circuit court denied. The defendant then moved to stay the proceedings pending the filing of a petition for leave to file a complaint for writ of *mandamus* for a supervisory order in the Illinois Supreme Court. The circuit court also denied this motion. On November 4, 1991, defendant filed with the Illinois Supreme Court a motion for leave to file a complaint for an order of *mandamus* or prohibition, or in the alternative, for a supervisory order and an emergency motion for stay of proceedings pending disposition of defendant's motion. The supreme court denied defendant's emergency motion on November 5, 1991. (*Konzen v. Caisley* (Nov. 5, 1991,

No. 72780) (Clerk's order).) The supreme court denied defendant's other motion on December 11, 1991. *Owens-Corning Fiberglas Corp. v. Caisley* (Dec. 11, 1991), Docket No. 72788 (Clerk's order).

At the pretrial hearing on November 7, 1991, defendant moved the circuit court to stay the trial pending a hearing upon its petitions in the supreme court. The court denied the motion. Defense counsel then advised the court that Konzen and Boeschenstein would not be appearing. Plaintiff moved to strike defendant's pleading and for entry of default judgment as a sanction for noncompliance with the Rule 237(b) notice, leaving only the issue of damages for the jury to determine. In support plaintiff stated that if Konzen were there he would testify, *inter alia*, that (1) he became medical director of defendant in 1968; (2) he was asked to evaluate the Bloomington plant before defendant purchased it regarding asbestos; (3) he made an investigation of the plant after it was purchased and from the inspection determined that the amount of airborne asbestos in the plant was unacceptable; (4) he hired an industrial engineer to study the plant, and the study stated that " '[t]his plant [was] grossly deficient. The industrial hygiene is totally inadequate. The airborne asbestos levels are excessive and certain to cause disease' "; (5) he made numerous trips to the plant until 1972, when asbestos was no longer used as an ingredient in the plant's processes; (6) he knew asbestos levels in the plant would cause disease and that the workers did not know that the level of asbestos to which they were exposed would cause disease; (7) he evaluated the health of decedent, and the evaluation showed decedent had asbestosis; (8) he knew no one told decedent that defendant knew he had asbestosis; and (9) the asbestos to which defendant exposed decedent caused decedent's lung cancer.

Plaintiff further asserted that Boeschenstein would testify as follows: (1) as of 1970, he was senior vice-president of defendant; (2) he had knowledge defendant used asbestos in its products, and these products caused disease in the plant and in people using them; (3) Konzen told him the condition at the plant was certain to cause disease, but defendant decided to continue to operate the plant in the same manner, knowing the workers did not know the risk to which they were exposed; and (4) he was involved in evaluating the recommendations Konzen made for further improvements at the plant, but these improvements were not made and the level of airborne asbestos was even in excess of those which the government and defendant knew would cause lung cancer.

Defendant denied that either person would make these statements. It argued that plaintiff had no basis to link Konzen to causation issues and suggested that if the court were going to issue a sanction the sanction be limited to the issue of its liability. The court ordered defendant's answer stricken, that a default judgment be entered, and that the case be tried only on the issue of damages. In so ruling, the court determined that it was due to the willfulness of defendant that Konzen and Boeschenstein did not appear, and, therefore, it was not unreasonable for the court to enter the sanctions that it did.

On November 12, 1991, plaintiff moved to bar defendant's expert witness, Harry Demopolous, from testifying. Plaintiff contended that the only disclosed opinion Demopolous held was that "[decedent] did not die from a disease which can be reasonably related to any alleged exposure to asbestos while employed by [defendant]." Plaintiff maintained this opinion was irrelevant to any issue before the jury, since it was no longer disputed that defendant was liable for the death of decedent. Plaintiff also argued that she was being deprived of the chance to

demonstrate through Konzen's testimony that decedent would have lived for a long time. Defendant argued Demopolous' testimony was relevant not to the issue of causation, but to decedent's life expectancy for the purpose of determining damages.

Plaintiff also filed a motion *in limine* asking that the court preclude defendant from communicating to the jury that someone or something other than the wrongful conduct of the defendant was the cause of death of decedent and from communicating any measure of the effect of the asbestos or any other condition upon decedent's health or life expectancy. The court allowed the motion *in limine* and also allowed plaintiff's motion to exclude the testimony of Demopolous in part. The court held that Demopolous was permitted to testify only to diseases—other than those of the lung—which would reduce decedent's life expectancy.

The trial proceeded on the issue of damages, and Dr. Harry Demopolous testified regarding the extent to which decedent's renal failure may have reduced his life expectancy. To rebut this testimony, plaintiff wished to call Konzen. Outside the presence of the jury, plaintiff called Konzen as a rebuttal witness, and defendant responded that he would not be available. In order to provide a basis for her argument that a negative inference could be drawn from Konzen's refusal to appear, plaintiff requested that defendant stipulate to several things. Defendant agreed to stipulate that Konzen was the medical director of defendant but refused to stipulate that he had any information regarding the issue of damages. Since defendant refused to stipulate to all that plaintiff wanted, she stated she would make an offer of proof to lay a foundation for the court to give a negative inference instruction and for the jury to draw certain inferences. Plaintiff also requested the court to strike Demopolous'

testimony since defendant precluded her from rebutting it with Konzen's. The court denied the request.

When the trial resumed the following day, plaintiff again requested that defendant produce Konzen so she could make her offer of proof in "question and answer form." Defendant replied that it was not going to produce Konzen and that plaintiff had failed to demonstrate Konzen had any knowledge relating to decedent's renal failure or his life expectancy. Plaintiff then made the following offer of proof, stating that Konzen would testify as follows: (1) he became the corporate medical director of OCF in 1968; (2) he became involved in a program of providing annual physical examinations for the employees at the Bloomington plant; (3) decedent's first examination as defendant's employee took place in 1970 by Dr. McNeely, and the reports of this examination were given to him; (4) McNeely and he determined that a further examination should be made of decedent, and those results were reported to him; (5) he was required to analyze the results of these annual physicals, and he did analyze and evaluate the results of decedent's physicals administered from 1970 through 1977; (6) he analyzed and evaluated the health of decedent as a part of his job; (7) he made evaluations of legal claims against defendant, including claims arising out of asbestosis, and has made such an evaluation of this case; (8) decedent sustained lung cancer as a result of his exposure to asbestos during the time he worked for defendant; (9) his lung cancer was the cause of his death and his renal failure; (10) he is familiar with the treatment of renal failure and that individuals such as decedent, who responded well to dialysis, could be expected to live a long time when treatment is continued; and (11) the reason decedent died when he did was that his body was "overburdened by, among other

things, the lung cancer and the effect that [it] had on the entirety of his body, including his renal disorder."

Defendant objected to the offer of proof; the court ordered it received and recorded as part of the evidence in the case, but sustained the objection, and ordered that it not be submitted to the jury. In light of the court's ruling, plaintiff requested that the court reconsider its ruling refusing to strike Demopolous' testimony. The court again declined to strike this testimony.

Therefore the only evidence plaintiff presented in rebuttal was a stipulation which the court read to the jury and was included as plaintiff's instruction No. 9. It stated: "Dr. Jon Konzen is currently the corporate medical director of [defendant]. He is in good health, and he is capable of traveling to Bloomington, Illinois[,] to testify. Defendant has refused to produce Dr. Konzen to testify in this case." No evidence was submitted in surrebuttal, and the instruction conference resumed. At the instruction conference, the court, over the objection of defendant, granted plaintiff's request that a "negative inference" instruction be given to the jury relating to the absence of Konzen.

The jury subsequently returned a verdict for plaintiff in the amount of $510,000, and the court entered judgment on the verdict against defendant OCF, and against defendants Brakegate, Ltd.; Cape Industries, PLC; Cape Asbestos Fiber, Ltd.; and EGNEP (Pty) Ltd. On December 23, 1991, defendant filed a post-trial motion for a judgment *n.o.v.*, or in the alternative, for a new trial or a remittitur. On February 4, 1992, the court ruled that Rule 237(b) was not unconstitutional and did not violate the due process clause of the U.S. and Illinois Constitutions, nor was it unconstitutional as applied to defendant. The court further determined that the sanctions imposed were the only

effective remedy for its noncompliance. Accordingly, the post-trial motion was denied. This appeal followed.

We first consider whether, in light of due process principles, the trial court lacked authority under Rule 237(b) to sanction a defendant for failure to produce witnesses not individually subject to Illinois process.

Rule 237(b) provides:

> "The appearance at the trial of a party or a person who at the time of trial is an officer, director, or employee of a party may be required by serving the party with a notice designating the person who is required to appear. The notice also may require the production at the trial of documents or tangible things. If the party or person is a nonresident of the county, the court may order any terms and conditions in connection with his appearance at the trial that are just, including payment of his reasonable expenses. Upon a failure to comply with the notice, the court may enter any order that is just, including any order provided for in Rule 219(c) that may be appropriate." 134 Ill. 2d R. 237(b).

Defendant initially contends that this rule must be read to comport with principles of due process, and it is a violation of those principles to sanction a defendant for its failure to produce witnesses not subject to the personal jurisdiction of the court. Defendant argues that under *Rollins v. Ellwood* (1990), 141 Ill. 2d 244, 565 N.E.2d 1302, the supreme court recognized the "fiduciary shield doctrine" and thereby established that a court could not obtain jurisdiction over an individual on the basis of the individual's status as an employee of a defendant. Defendant further contends that *Salvator v. Admiral Merchant's Motor Freight* (1988), 175 Ill. App. 3d 901, 530 N.E.2d 639, established that a court cannot compel an

individual, who was not himself subject to the jurisdiction of a court, to appear as a witness because the court has jurisdiction over his employer. Based on these rulings, defendant maintains that since an individual's status as an employee of a defendant cannot be relied on to compel the individual to appear as a witness, it follows that an individual's employer may not be sanctioned for the individual's failure to appear.

In the pending case, the record illustrates that Konzen and Boeschenstein were residents of Ohio; their principal place of business was in Ohio; and they had no personal contacts with Illinois, did not own property in the State or conduct business here, nor did they appear to have otherwise invoked the benefits and protections of Illinois law. The only association they had with Illinois was within the scope of their employment. The trial court recognized it did not have personal jurisdiction over them. However, this fact is of no avail to defendant. The order in this case was directed to the corporate defendant over which the trial court did have jurisdiction, not Konzen and Boeschenstein personally. This factor distinguishes *Salvator*, in which the order was specifically directed at the employee rather than the corporate defendant.

As long as the order is directed at the corporate defendant rather than the individual employees and directors, principles of due process are not violated, and a court may sanction a corporate defendant for its failure to produce its employees. Ultimately, it is the corporate defendant which forces its employees to submit to the jurisdiction of Illinois, not the court. A court has broad authority over a party for the effective administration of justice, and that authority includes the power to compel a party to produce its employees, officers, and directors at trial. While we realize Rule 237(b) may be subject to abuse, its application is under the control of the trial court and the rule is

appropriately employed where, as in this case, there was sufficient evidence to establish its use was intended to elicit probative testimony rather than for harassment. Plaintiff showed good cause. *Oakview New Lenox School District No. 122 v. Ford Motor Co.* (1978), 61 Ill. App. 3d 194, 199, 378 N.E.2d 544, 547-48.

We next consider whether the sanctions entered against defendant for failing to produce the witnesses exceeded the permissible scope of Supreme Court Rule 219(c) (134 Ill. 2d R. 219(c)). Upon the failure to comply with a Rule 237(b) notice, a court "may enter any order that is just, including any order provided for in Rule 219(c) that may be appropriate." (134 Ill. 2d R. 237(b).) In the present case, the court ordered defendant's pleadings stricken and entered default judgment. On the issue of damages, the court restricted defendant to producing evidence relating to health conditions of the defendant, other than those of the lungs, which may have reduced his life expectancy. On appeal, defendant argues the trial court erred in defaulting it on issues relating to causation and damages because it went beyond the scope of the issues to which Konzen and Boeschenstein could have testified.

The imposition of sanctions under Rule 219(c) is a matter within the discretion of the trial court, and a reviewing court will uphold the trial court's decision, absent an abuse of discretion. (*Wegman v. Pratt* (1991), 219 Ill. App. 3d 883, 891, 579 N.E.2d 1035, 1041; *Palmer v. Minor* (1991), 211 Ill. App. 3d 1083, 1086, 570 N.E.2d 774, 776.) Pleadings may be stricken "only when the stricken pleadings bear some reasonable relationship to the information withheld." (*People ex rel. General Motors Corp. v. Bua* (1967), 37 Ill. 2d 180, 197, 226 N.E.2d 6, 16.) The striking of an answer, thereby causing a default, is the most severe sanction a court can impose on a recalcitrant defendant, and such sanction is proper only in

those cases where the actions of a party show deliberate, contumacious or unwarranted disregard of a court's authority. *Barnes v. Black & Decker Manufacturing Co.* (1984), 135 Ill. App. 3d 700, 706, 481 N.E.2d 1200, 1204.

A review of the record reveals that defendant had ample opportunity to comply with plaintiff's Rule 237(b) request but failed to do so. The court found this failure to produce the witnesses was willful and, accordingly, entered sanctions. The trial court did not abuse its discretion in entering sanctions. Although plaintiff did not depose Konzen and Boeschenstein, there was sufficient evidence in the record of the information plaintiff expected to elicit to support a finding that Konzen and Boeschenstein would have relevant information on these issues. (*Soto v. E.W. Bliss Division of Gulf & Western Manufacturing Co.* (1983), 116 Ill. App. 3d 880, 889, 452 N.E.2d 572, 579; *Oakview*, 61 Ill. App. 3d at 199, 378 N.E.2d at 547-48.) Although defendant asserted that Konzen and Boeschenstein did not possess any relevant information on the issue of causation, the record contains numerous documents to or from Konzen and Boeschenstein relating to potential health hazards of the plant's operations; the health status of production employees; asbestos levels and exposure at the plant; and current and future medical programs and activities, including instituting a respiratory program, arranging to have chest X rays monitored by outside consultants, conducting medical evaluations of selected employees' pulmonary status, and having individuals identified as having or possibly having asbestosis consult a chest specialist. This was sufficient information for the trial court to conclude that Konzen and Boeschenstein could have relevant information relating to this issue. Neither plaintiff nor the trial court was required to accept defendant's denials that Konzen and Boeschenstein knew anything.

Further, the trial court did not err in limiting defendant's evidence on the issue of damages. Defendant alleges that decedent left its employ 10 years before he died, and, therefore, Konzen would not have any information or personal knowledge regarding the impact of asbestosis on decedent's life expectancy. The record illustrates, however, that Konzen was involved with assessing the inplant environmental hazards and their effect on the employees, reviewing the medical conditions and examinations of employees relating to their exposure to asbestos, and establishing a medical procedure for examinations of employees suspected of having asbestosis. This evidence supports a finding that Konzen's testimony could relate to the issue of damages so that the court's holding limiting defendant's evidence on this issue was not an abuse of discretion.

Finally, we address whether the trial court erred in giving a negative inference instruction to the jury. Plaintiff's tendered jury instruction No. 7 was based on the Illinois Pattern Jury Instructions, Civil, No. 5.01 (Illinois Pattern Jury Instructions, Civil, No. 5.01 (3d ed. 1992) (hereinafter IPI Civil 3d)). Plaintiff offered this instruction because he was unable to rebut Demopolous' testimony with Konzen's. Defendant argues the trial court erred in giving this instruction because Konzen could not offer any relevant information on the impact of decedent's renal failure on his life expectancy. This contention is also without merit.

IPI Civil 3d No. 5.01 instructs that where a party fails to produce a witness within its power to produce, the jury may infer that the testimony of the witness would be adverse to that party. The adverse inference is available when (1) the witness was under the control of the party to be charged and could have been produced by reasonable

diligence, (2) the witness was not equally available to the adverse party, (3) a reasonably prudent person under the same or similar circumstances would have produced the witness if he believed the testimony would be favorable to him, and (4) no reasonable excuse for the failure to produce the witness has been shown. (*Lewis v. Cotton Belt Route-St. Louis Southwestern Ry. Co.* (1991), 217 Ill. App. 3d 94, 108-09, 576 N.E.2d 918, 930.) The court allowed the instruction by reasoning that Konzen was under defendant's legal control and not equally available to plaintiff.

The giving of IPI Civil 3d No. 5.01 is within the sound discretion of the trial court, and a court of review should reverse only when a clear abuse of discretion appears from the record. (*Betts v. Manville Personal Injury Settlement Trust* (1992), 225 Ill. App. 3d 882, 901, 588 N.E.2d 1193, 1205; *Thompson v. Abbott Laboratories* (1990), 193 Ill. App. 3d 188, 201-02, 549 N.E.2d 1295, 1304; *Tonarelli v. Gibbons* (1984), 121 Ill. App. 3d 1042, 1046-47, 460 N.E.2d 464, 468.) Before giving the instruction, the trial court must first determine whether, in all likelihood, the party would have produced the witness under the facts and circumstances of the case unless the testimony would be unfavorable. (*Thompson*, 193 Ill. App. 3d at 202, 549 N.E.2d at 1304; *Tonarelli*, 121 Ill. App. 3d at 1047, 460 N.E.2d at 468.) Where a witness who has knowledge of the facts and is accessible to a party is not called by a party, a presumption arises that his testimony would be adverse to that party and an instruction could or should be given to that effect upon request. (*Tonarelli*, 121 Ill. App. 3d at 1047, 460 N.E.2d at 468.) The instruction is not warranted, however, when the unproduced witness' testimony would be merely cumulative. *Chuhak v. Chicago Transit Authority* (1987), 152

Ill. App. 3d 480, 489, 504 N.E.2d 875, 881; *Thompson*, 193 Ill. App. 3d at 202, 549 N.E.2d at 1304.

Assuming *arguendo* an error occurred, an error in instructing the jury must have resulted in prejudice to the appealing party for a reversal to be warranted. (*Brazier v. Kontos* (1987), 160 Ill. App. 3d 177, 184, 513 N.E.2d 152, 157; *Villc v. Crown Cork & Seal Co.* (1990), 202 Ill. App. 3d 1082, 1088, 560 N.E.2d 969, 973; *Kohutko v. Four Columns, Ltd.* (1986), 148 Ill. App. 3d 181, 188-89, 498 N.E.2d 522, 527.) Defendant merely asserts in its brief that "prejudicial error" occurred; it provides no discussion. It is unclear from the record whether the jury in fact found these four factors existed warranting a negative inference to be drawn from the fact that defendant failed to produce Konzen, or took this into consideration when determining damages. Even if the trial court abused its discretion in giving the instruction, no prejudice has been shown. Consequently, any alleged error in instructing the jury does not warrant reversal.

For the foregoing reasons, we affirm the judgment of the trial court.

Affirmed.

STEIGMANN and MCCULLOUGH, JJ., concur.

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK

. . .

December 2, 1992

. . .

No. 74373—Opal Johnson, Indv., etc., respondent, v. Owens-Corning Fiberglas Corporation, petitioner. Leave to appeal, Appellate Court, Fourth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on December 24, 1992.

IN THE SUPREME COURT OF ILLINOIS

No.: 74373

OPAL JOHNSON, Individually and as Special Administrator for the Estate of WILLIAM JOHNSON,

Plaintiff-Respondent,

—v.—

OWENS-CORNING FIBERGLAS CORP.,

Defendant-Petitioner,

—and—

BRAKEGATE, LTD., et al.,

Defendants.

APPEAL FROM THE APPELLATE COURT OF ILLINOIS, FOURTH DISTRICT

No. 4-92-0175

There Heard on Appeal from the Circuit Court of the Eleventh Judicial Circuit, McLean County, Illinois

No. 89 L 187

The Honorable William T. Caisley

ORDER

This matter has come for consideration upon the motion of Petitioner to stay the mandate of this Court pending appeal or application for *certiorari* in the United States Supreme Court.

IT IS ORDERED that the mandate of this Court in the above cause is stayed pending the filing of a notice of appeal or an application for *certiorari* or the expiration of the period within which said application or notice may be filed. If *certiorari* is applied for or notice of appeal filed, the mandate of this Court shall, upon proof of such filing being made by affidavit filed with the clerk of this Court, be further stayed pending resolution by the United States Supreme Court of such application or appeal. If no such affidavit is filed, the mandate shall, without further order, issue upon the expiration of the time within which appeal or *certiorari* may be sought.

Ben K. Miller
Chief Justice

FILED
DEC 28 1992
SUPREME COURT CLERK

STATE OF ILLINOIS

IN THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT
COUNTY OF MCLEAN

No. 89 L 187

OPAL JOHNSON, Individually and as Special Administrator for the Estate of WILLIAM JOHNSON, deceased,

Plaintiff,

—v.—

OWENS-CORNING FIBERGLAS CORP., et al.,

Defendants.

JUDGMENT ORDER

Judgment is entered upon the verdict of the jury for Opal Johnson, Administrator of the Estate of William Johnson, deceased, and against Brakegate, Ltd.; Cape Industries, PLC; Cape Asbestos Fibres, Ltd.; EGNEP (Pty) Limited; and Owens-Corning Fiberglas Corporation, jointly and severally, in the sum of $510,000.00 plus costs.

/s/ William T. Caisley
Circuit Judge

November 13, 1991

STATE OF ILLINOIS

IN THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT
COUNTY OF MCLEAN

No. 89 L 187

OPAL JOHNSON, Individually and as Special Administrator for the Estate of WILLIAM JOHNSON, deceased,

Plaintiff,

—vs.—

OWENS-CORNING FIBERGLAS CORP., et al.,

Defendants.

ORDER

This cause has come on for hearing upon the post-trial motion of the defendant, Owens-Corning Fiberglas Corporation for judgment notwithstanding the verdict or for a new trial. The parties waived oral argument on the motion and submitted the issues raised thereby to the court for ruling after consideration of the briefs filed by the parties.

The court found that Supreme Court Rule 237(b) is not unconstitutional in violation of the due process clause of the constitution of the United States and the constitution of the State of Illinois; that it is not unconstitutional as applied to this defendant and its director, W. W. Boeschenstein and its employee, Dr. Jon Konzen.

The court further found that striking the pleadings of the defendant, Owens-Corning Fiberglas Corporation, and entering a default pursuant to Supreme Court Rule 219(c) is the only effective sanction which the court could apply in response to the defendant, Owens-Corning Fiberglas Corporation['s] refusal to comply with Supreme Court Rule 237(b). The post-trial motion is accordingly denied.

ENTERED this 28th day of January, 1992.

/s/ William T. Caisley
Circuit Judge

FILED
FEB 04 1992
MCLEAN COUNTY
CIRCUIT CLERK

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT
COUNTY OF MCLEAN
No. 89 L 187

OPAL JOHNSON, Individually and as Special Administrator for the Estate of WILLIAM JOHNSON, deceased,

Plaintiff,

—VS.—

OWENS-CORNING FIBERGLAS CORP., et al.,

Defendants.

ORDER

This cause having come on before the court this date on motion of the defendant, OWENS-CORNING FIBERGLAS CORPORATION, by its attorneys, BAKER & MARTIER, for the entry of an interlocutory order pursuant to Supreme Court Rule 308(a) (Ill. Rev. Stat. ch. 110A, Sec. 308(a)), and the court being fully advised in the premises;

IT IS HEREBY ORDERED that said motion is denied.

/s/ William T. Caisley
Circuit Judge

November 1, 1991

STATE OF ILLINOIS

IN THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT
COUNTY OF MCLEAN

No. 89 L 187

JOHNSON,

Plaintiff,

—v.—

OWENS-CORNING, et al.,

Defendants.

ORDER

This cause coming on to be heard this date on motion for stay of proceedings, of OCF, by its attorneys, Baker & Martier, & the court being fully advised;

It is hereby ordered that said motion is denied;

It is hereby further ordered that should the Illinois Supreme Court grant OCF's motion for leave to file a complaint for an order of mandamus, OCF has leave to renew its motion for stay;

It is hereby further ordered that, pursuant to plaintiff's oral motion, OCF shall produce the May, 1990 deposition [of] Dr. J. Konzen instanter.

/s/ William T. Caisley
Circuit Judge

November 1, 1991

STATE OF ILLINOIS
SUPREME COURT CLERK

. . .

November 5, 1991

. . .

THE COURT HAS TODAY ENTERED THE FOLLOWING ORDER IN THE CASE OF:

No. 72780—Jon Konzen, etc., et al., petitioners v. Hon. William T. Caisley, Judge of the Circuit Court of McLean County, et al., etc., respondents.

The motion by petitioners for stay of proceedings in the Circuit Court of McLean County in *Johnson v. Owens Corning Fiberglas*, case No. 89 L 187 pending disposition of petitioners' motion for mandamus/prohibition or supervisory order is *denied*.

STATE OF ILLINOIS
SUPREME COURT CLERK

. . .

December 11, 1991

. . .

In re: Owens-Corning Fiberglas Corporation, petitioner, v. Hon. William Caisley, etc., et al., respondents. No. 72788

. . .

The Court has today entered the following order in the above entitled cause:

The motion by petitioner for leave to file a petition for an original writ of mandamus or prohibition or for a supervisory order is *denied*.

STATE OF ILLINOIS

IN THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT
COUNTY OF MCLEAN

No. 89 L 187

OPAL JOHNSON, as Administrator for the
Estate of William Johnson,

Plaintiff,

—vs.—

BRAKEGATE, et al.,

Defendants.

HEARING ON MOTIONS

[Excerpts containing rulings of court striking special and limited appearances and denying motion to quash Rule 237(b) notice.]

REPORT OF PROCEEDINGS of the hearing before the Honorable WILLIAM T. CAISLEY, on the 1st day of November, 1991.

. . . .

THE COURT: All right. I agree that the Court does not have the authority to compel them [*i.e.*, Dr. Konzen and Mr. Boeschenstein] to come to the State of Illinois to testify, and they are not. I agree with the Plaintiffs, that they are not parties, and, and they are not subject to special

limited appearance procedure under our Code of Civil Procedure, and so I am going to order that the special and limited appearance be stricken because they are not parties, and they have no right to appear here, and the coercion, if there is any, upon your client is the economic coercion of their employer in desiring to have their testimony in court. So that, it is sheerly a matter of economic coercion. If your employees do not wish to come, then they don't have to come. If they don't come, then probably Owens-Corning Fiberglas is going to suffer a default, and there will be a judgment entered here.

If that is done, then Owens-Corning may terminate the employment of your clients, but that is not something that the Court's going to do. It is then solely Owens-Corning's decision as to whether they are going to terminate your clients' employment contracts.

. . . .

THE COURT: I certainly agree with you that due process applies. It is up to Owens-Corning to determine what they wish to do with their employees that they have asked to come to Illinois to testify. If they don't come, then it's a matter of what Owens-Corning is going to do with them. If they figure that they got a better deal in this Court, a better judgment than they had anticipated, they may pat them on the back and say, "We're glad you chose to ignore our directions to appear in court in Illinois."

On the other hand, if they suffer a significant loss as a result of a default being entered against them, then at that point they may say, "Well, you know, our loss is directly attributable to Dr. Boeschenstein and Dr. Konzen not going to Illinois, and, and, therefore, we are going to terminate them." And if they do, that's just the economic marketplace of the State of Illinois and the State of Ohio.

. . . .

THE COURT: All right. I am simply going to strike the special and limited appearance and order that Owens-Corning produce the witnesses pursuant to Supreme Court Rule 237.

. . . .

THE COURT: All right. I guess that I agree, that the Plaintiff could go to Ohio and take the depositions of those people. Instead, the Plaintiff here has chosen to present their testimony in person and has proposed to produce them pursuant to Supreme Court Rule 237. It is the purpose of Supreme Court Rule 237 to require that parties produce agents, officers, employees. It is not limited to corporations. It is not just applicable to corporations. It is applicable to anybody who acts as a principal and who has agents who are within his employ. It applies to all of them across the board. It is not more burdensome on corporations than it is on individuals except to the extent that corporations may have more agents than individuals do, but it applies across the board to everyone who chooses to employ an agent or who has officers or directors. It applies to all, and the purpose of Supreme Court Rule 237 is to avoid all of the problems that are associated with compelling out of state witnesses to appear at a place outside of the State of Illinois to petition a court to compel them to appear at a certain time and place and to submit to the taking of their evidence depositions and so forth.

It is the very purpose of Supreme Court Rule 237 to avoid those problems. Those problems still have to be surmounted when there are witnesses who are not within the control of any party. If Dr. Konzen were to rescind his position with Owens-Corning Fiberglas effective at the close of business today, if Mr. Boeschenstein were to

retire from the Board of Directors at the close of business today, then the Plaintiff would necessarily be stuck with having to go to the State of Ohio and asking the Ohio Court to compel those people to submit to the taking of their depositions.

By means of Rule 237, they are not required to do that. They can simply serve a notice on Owens-Corning to produce their servants and employees and agents here in the State of Illinois.

If the Board of Directors meeting were being held in Chicago, Illinois and Mr. Boeschenstein chose not to appear for that, then I suppose it would be up to the shareholders of Owens-Corning Fiberglas whether they wished to re-elect him, or whether they wished to get a director who would be more diligent in attending board meetings. Likewise, if he chooses to thumb his nose at Owens-Corning's direction to appear here to testify, he may do that. The shareholders of Owens-Corning Fiberglas may choose then to not re-elect him to the Board of Directors if he subjects the corporation to liability, or they may choose to just overlook that and say he makes such a valuable contribution to our organization that we are not going to vote him off the Board, and, likewise, of Mr. Konzen, Dr. Konzen, they may choose to continue to employ him. He makes a valid contribution to the success of the corporation, and it would be very difficult to replace, or they may choose to take disciplinary action against Dr. Konzen for wilful neglect of his duties when requested to travel to Illinois to testify.

So it is my position that it is the very purpose of Rule 237 to compel out-of-state witnesses, in particular. It is just a matter of convenience within the State of Illinois that you don't have to send the Sheriff out serving subpoenas on these people, but when it gets to out-of-state

witnesses then it is not just a matter of convenience, it is a matter that affects the ability of the Courts of the State of Illinois to carry out their function in adjudicating disputes. It goes to the very heart of the production of evidence in Court, and it is, after all, one of the burdens that goes with conducting business as modern corporations do, from coast to coast in every state. It is just a burden that goes along with the privilege of conducting that business.

So I am going, I am going to deny the motion of Owens-Corning Fiberglas to quash the Rule 237 notices for the production of Dr. Jon L. Konzen and Mr. W. W. Boeschenstein.

. . . .

STATE OF ILLINOIS

IN THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT
COUNTY OF MCLEAN

No. 89 L 187

OPAL JOHNSON, Individually and as Special Administrator for the Estate of William Johnson, deceased,

Plaintiff,

—VS.—

BRAKEGATE, et al.,

Defendants.

HEARING ON PRE-TRIAL MOTIONS

[Excerpt containing ruling of court entering default against OCF.]

REPORT OF PROCEEDINGS of the hearing before the Honorable WILLIAM T. CAISLEY, on the 7th day of November, 1991.

. . . .

THE COURT: All right. In looking at this, it does appear to me that the failure of Dr. Konzen and Mr. Boeschenstein to appear in the State of Illinois to testify in the trial of this case is serious, and it is aggravating. It is aggravated in that the Court is not able to determine for certain whether it is the wilfulness of Mr. Boeschenstein as a corporate director of the Defendant Owens-Corning

Fiberglas Corporation, and the wilfulness of Dr. Konzen, the medical director of that corporation, to disregard an order given to them by Owens-Corning Fiberglas Corporation to appear in the State of Illinois and to testify in this cause, or whether it is the corporate decision of Owens-Corning Fiberglas Corporation to direct them not to appear and to thereby disobey the order of the Court.

It is not possible based upon what this Court knows of this case for the Court to determine that issue completely. If it is the refusal of the two witnesses to appear, then they have subjected their principal to risk of grave sanctions against it, and it does appear that in the scope of this litigation that that, that their failure to appear should be determined by the Court to be the fault of the Defendant, Owens-Corning Fiberglas. I rather believe because of the seriousness of the sanctions which could be imposed upon those two witnesses, that they would choose, if directed to do so, to appear in the State of Illinois to testify in the trial of this case.

After all, they've both been, at least one of them has been deposed, and that's Dr. Konzen, just yesterday in Toledo, in the State of Ohio, and, and so it appears that it's not a situation where he doesn't know what he might be asked to testify to. It's not a situation where he lacks sufficient knowledge or anything of that kind. It does appear that he knows exactly what this is about. It does appear that both of these people have been in Bloomington, Illinois at the time that Owens-Corning Fiberglas operated the plant at 1111 West Perry Street on numerous occasions during that period of time.

They, obviously, appeared in the State of Illinois to conduct the business of their principal at that time, and it seems to me that they would likewise do so at this time if they were directed to do that by the Defendant. Dr.

Konzen is subject to termination of his employment by Owens-Corning Fiberglas, or reduction in pay, or demotion, or suspension, or any of the things that employers have a right to do with respect to employees who are employed at will.

It does appear that Mr. Boeschenstein is not simply an employee. He is a director, and if he fails to carry out his fiduciary obligations with respect to his service as a director of the corporation, he may thereby become liable to shareholders who bring an action against him for breach of his fiduciary obligations, and he may also be subject to a derivative suit against him, and he is also subject, of course, to the ultimate sanction which shareholders retain, and that is to vote him out of office. He must obviously feel that in not coming to the State of Illinois that he is serving the best interests of his principal and can establish in any shareholder litigation that his action was not a breach of his fiduciary obligation and was, in fact, promoting the interests of his employer, of his corporation, of which he is a director, by not coming to the State of Illinois.

Thus, it appears to me that it is a matter of wilfulness on the part of the Defendant Owens-Corning Fiberglas, because otherwise, the penalties upon, the economic penalties that could be visited upon both Dr. Konzen and Mr. Boeschenstein for failing to appear are so heavy that it does not seem to the Court that they would be inclined not to appear in the State of Illinois on a single day when they are healthy individuals and able to make the trip and so forth, that they would not appear here to do that. So I can only conclude, based upon that analysis, because I have no direct evidence one way or another, that it is, in fact, the Defendant Owens-Corning Fiberglas which is directing them not to appear here, and that equates to me to be a matter of wilfulness.

Most of the cases which have been decided under Supreme Court Rule 219, which imposes sanctions for violation of various Supreme Court Rules relative to civil litigation in the Trial Court, relate to cases of failure to comply with discovery, and there are cases that say that this is aggravated, an aggravated situation, this is a, one which should have been handled simply on a motion to compel and so forth and so on.

All of those things are fine when you analyze Supreme Court Rule 219 with respect to violation of discovery orders. This is not a discovery order. This is an order, or this is a, for violation of a Supreme Court Rule, Rule 237, which has to do with the production of evidence in Court.

Now, I think most Judges have a pretty healthy respect for the role of discovery in civil litigation, and wish to promote discovery in civil cases because they believe that it will facilitate the resolution of civil litigation by bringing about settlements or simplifying issues, or making the case go more smoothly and more quickly when the trial begins, and, therefore, the Court system has a vested interest in promotion of discovery, but if the Court system has a vested interest in the promotion of discovery, it has a much greater interest in the production of people to testify at trial, and that goes to the very heart of the truth seeking process. The production of witnesses, the production of testimony in Court.

If Courts do not have the authority to compel people who are in possession of knowledge concerning the matters which are being litigated, if they do not have the authority to compel the production of documentary evidence, if they do not have the, these resources, then there can be no due process, and, and the goal of seeking the truth and doing justice is going to be thwarted, and I think this is stated simply to indicate the importance that the

Court attaches to the production of witnesses, and while sanctions for failure to comply with discovery are important, it seems to me that it is much more important in this case, because this does not relate to discovery but relates to production of evidence at trial.

Therefore, I do think that it is not unreasonable for the Court to strike the answer of the Defendant Owens-Corning Fiberglas and to order a default and to order that the case be tried on the issue of damages only in this situation, and if the Plaintiff, or if the Defendant wishes to do so, I would be happy to consider, to reconsider that if they are willing to produce Mr. Boeschenstein and Dr. Konzen to testify here, and the Court would be willing to make concessions with respect to trying to arrange a convenient time schedule for their appearance to testify, but if the Defendant remains confirmed in its decision not to produce those two agents and employees, then that's my decision.

. . . .